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Supreme Court, U.S
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No. 92-1753

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

ROBERT CHARLES ROOS, IV

Petitioner

vs.

BANCFIRST OF SULPHUR, OKLAHOMA

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
STATE OF OKLAHOMA

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. BECAUSE THE JANUARY 19, 1988 JUDGMENT ESTABLISHED CONTINGENT LIABILITY AGAINST PETITIONER, IT VIOLATED THE AUTOMATIC STAY

Respondent asserts that because it notified the Murray County, Oklahoma District Court in its December 16, 1987 motion that Petitioner was in bankruptcy, Respondent did not violate the automatic stay. Respondent then asserts that the January 19, 1988 judgment itself did not violate the automatic stay because the judgment was against only the purported partnership and not against Petitioner. Respondent overlooks the key issue. The automatic stay protected Petitioner from any act to collect or assess a pre-petition claim, including contingent liability. 11 U.S.C. §§ 101(5)(A), 362(a)(1), (6); see In re Hemingway Transport, Inc., 954 F.2d 1, 8 (1st Cir. 1992).

Respondent does not contest Petitioner's assertion that Petitioner was still in bankruptcy on January 19, 1988. Respondent does not contest, nor even address, Petitioner's assertion that, under Oklahoma law, the January 19, 1988 judgment established contingent liability against Petitioner while he was in bankruptcy. Finally, Respondent does not contest, nor even address, Petitioner's assertion that the automatic stay barred any act to establish even contingent liability against Petitioner while Petitioner was in bankruptcy.

The cases Respondent cites are distinguishable. In Liberty Nat'l Bank v. Bear, 276 U.S. 215 (1928), it was the partnership, not, as here, the individual partner that was in bankruptcy. Id. at 220.

In both In re Cardinal Indus., Inc., 105 B.R. 834 (Bankr. S.D. Ohio 1989), and In re Dreske, 25 B.R. 268 (Bankr. E.D. Wis. 1982), the plaintiffs were simply seeking to foreclose mortgages on real property owned by the partnerships.

In Cardinal, the court specifically recognized that the plaintiffs were not seeking, as was Respondent here, to obtain judgments against the various partnerships for partnership debts, but rather sought only to foreclose mortgages on partnership properties. 105 B.R. at 849. Even then, the court enjoined the plaintiffs from proceeding with those foreclosure actions which would affect second mortgages the debtor partners had on partnership properties. Id. at 855.

In Dreske, the court stated that while the plaintiffs could proceed with a foreclosure against the partnership's real property, the automatic stay barred any act to collect any deficiency from the debtor partner. 25 B.R. at 268.

II. THE EQUITABLE DOCTRINES OF LACHES AND WAIVER DO NOT BAR PETITIONER FROM SEEKING RELIEF

Respondent does not contest Petitioner's assertion that acts in violation of the automatic stay are void ab initio. Respondent, however, asserts that because Petitioner did not file his motion to vacate the Murray County Court's January 19, 1988 judgment until April 25, 1991, the equitable doctrines of laches and waiver bar Petitioner from claiming that judgment (which was entered while Petitioner was in bankruptcy and protected by the automatic stay) is void and unenforceable as against Petitioner. Respondent further asserts that for this reason, this Court should deny Petitioner's petition for writ of certiorari.

Respondent's assertions are contrary to Oklahoma statute and decisions of the Oklahoma Supreme Court, United States courts of appeals and United States district courts. Moreover, Respondent did not raise the issue of estoppel in the lower courts.

The relevant Oklahoma statute provides that any person affected by a void judgment may seek relief therefrom at any time:

> Proceedings to vacate or modify a judgment or order, for the causes mentioned in paragraphs 4, 5 and 7 of Section 1031 of this title must be commenced within two (2) years after the judgment was rendered or order made, unless the party entitled thereto be an infant, or a person of unsound mind and then within two (2) years after removal of such disability. Proceedings for the causes mentioned in paragraphs 3 and 6 of Section 1031 of this title, shall be within three (3) years, and in paragraph 9 of Section 1031 of this title, within one (1) year after the defendant has notice of the judgment. A void judgment may be vacated at any time, on motion of a party, or any person affected thereby.

Okla. Stat. tit. 12, § 1038 (1991).

In Chaney v. Reddin, 205 P.2d 310, 313 (Okla. 1949), the Oklahoma Supreme Court, relying on the last sentence of § 1038, held that the doctrine of laches would not bar a plaintiff from seeking to set aside a void judgment, even though he had waited more than eight years to do so.

The United States courts of appeals and United States district courts which have addressed this issue have similarly held that laches will not bar attack on a void judgment. In re Center Wholesale, Inc., 759 F.2d 1440, 1448 (9th Cir. 1985); Misco Leasing, Inc. v. Vaughn, 450 F.2d 257, 260 (10th Cir. 1971); Austin v. Smith, 312 F.2d 337, 343 (D.C. Cir. 1962); Triad Energy Corp. v. McNell, 110 F.R.D. 382, 385 (S.D.N.Y. 1986); Ruddies v. Auburn Spark Plug Co., 261 F. Supp. 648, 658 (S.D.N.Y. 1966); In re Borek, 180 F. Supp. 567, 568 (D.N.J. 1960). The times between the judgments and the motions to vacate ranged from three and one-half months in Center Wholesale (759 F.2d at 1444) to over four years in Austin (312 F.2d at 343).

While this Court has not directly addressed this issue, it did, in Klapprott v. United States, 335 U.S. 601 (1949), reverse the decision of a United States court of appeals and directed a United States district court to vacate a void judgment (id. at 615-16) even though the petitioner did not seek to vacate the judgment until more than four years after it was rendered. Id. at 603.

Respondent did not raise the doctrine of estoppel in the appellate proceedings below. As a general rule, this Court does not decide questions not raised or resolved in the lower courts. E.g., Taylor v. Freeland & Kronz, 503 U.S. ___, ___, 118 L.Ed.2d 280, 288-89 (1992); Lawn v. United States, 355 U.S. 339, 362-63 n.16 (1958).[1]

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[1]Even if this Court were to address the estoppel question notwithstanding Respondent's failure to raise it below, an essential element is missing. This Court has stated that "the party claiming the estoppel must have relied upon its adversary's conduct 'in such a manner as to change his position for the worse.'" Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 60 (1984). Here, the only detriment Respondent claims from Petitioner's not filing his motion to vacate until April 25, 1991, is that Respondent purportedly could have acted to mitigate any damages Petitioner claims. This assertion overlooks the fact that Petitioner did not seek any damages in this action. Petitioner simply sought to vacate the January 19, 1988 judgment or to obtain a declaration that that judgment was void and unenforceable as against Petitioner.

Respondent's acts also belie its words. On September 27, 1991, Petitioner had a writ of execution issued against Petitioner in the Murray County action to enforce the January 19, 1988 judgment. At that time, Petitioner had already filed a motion to vacate in the Murray County Court and a petition in error and a petition for writ of mandamus in the Oklahoma Supreme Court. In each of these pleadings, Petitioner had claimed the January 19, 1988 judgment was void and unenforceable against him.

III. RESPONDENT ATTEMPTS TO RAISE MATTERS OUTSIDE THE LOWER COURT PROCEEDINGS

Respondent makes reference in its brief to an entirely separate action Petitioner filed against Respondent in the United States District Court for the Eastern District of Oklahoma (the "Eastern District Action") and attached a copy of the complaint as Appendix C. In the event this Court finds there are exceptional circumstances (see Youakim v. Miller, 425 U.S. 231, 234 (1976)) that would justify considering matters which were not part of this case, MCI submits this Court should also consider a number of admissions Respondent made in the Eastern District Action.

Respondent admitted that it sought a determination in its December 16, 1987 motion that Petitioner was a partner of Roos Trust, the purported partnership. Respondent further admitted that it did so to establish contingent liability against Petitioner while he was in bankruptcy.

These admissions are absolutely contrary to the statement in Respondent's brief here that Petitioner purportedly "lacks even a colorable argument that Respondent violated the automatic stay."

CONCLUSION

The January 19, 1988 state court judgment was entered while Petitioner was in bankruptcy and protected by the automatic stay. It is therefore void and unenforceable against Petitioner. Kalb v. Feuerstein, 308 U.S. 433, 438-39 (1940). The doctrine of laches cannot make that judgment valid against Petitioner.

Petitioner therefore respectfully requests that this Court enter an order pursuant to Rule 16.1 summarily reversing the lower court's decision or, alternatively, that this Court grant his petition for writ of certiorari and review the decision of the Oklahoma Supreme Court.

Respectfully submitted,

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